IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1947

PANHANDLE EASTERN PIPE LINE CO.,
Appellant,

v.

THE PUBLIC SERVICE COMMISSION OF INDIANA, et al
Appellees.

Cause No. 69

APPEAL FROM THE SUPREME COURT OF THE STATE OF INDIANA

BRIEF FOR APPELLEE, PUBLIC SERVICE COMMISSION OF INDIANA

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Opinions Below

The opinion of the Supreme Court of Indiana (R. 196) has not yet been officially reported but is unofficially reported at 71 N. E. (2d), 117. The opinion of the Circuit Court of Randolph County, Indiana is not reported but appears as Appendix B of Appellant's statement as to jurisdiction herein. The opinion of the Public Service Commission of Indiana of November 21, 1945 is not reported but is set out at pages 116 to 173 of the Record

in this case. Its first supplemental order and opinion appears at pages 180 to 191 of the Record in this case.

Jurisdiction

The judgment of the Supreme Court of Indiana was entered February 5, 1947 (R. 196). A petition for an appeal was filed March 25, 1947 and was allowed on the same day, (R. 228.).

The jurisdiction of this Court was invoked by Appellant under Section 237 of the Judicial Code, as amended (36 Stat. 1156; 43 Stat. 937; 45 Stat. 54; 28 U.S.C.A. 344 (a)).

Appellant contends that an order of the Public Service Commission of Indiana, dated November 21, 1945 (R. 171 to 173) as supplemented by an order dated April 9, 1946 (R. 190 to 191) is invalid as being repugnant to the Commerce Clause of the Constitution of the United States.

The order of the Commission dated November 21, 1945, by its express provisions ordered appellant (1) to file with the Bureau of Tariffs of the Commission its tariffs covering rates, rules and regulations appertaining to any and all sales of natural gas by Appellant *direct to ultimate consumers* within the State of Indiana; (2) file its annual reports for 1942 and all subsequent years so long as it distributes gas direct to any consumers in Indiana; and (3) file with the Commission copies of certain other reports and data. (R. 171-173)

The Appellee, The Public Service Commission of Indiana, filed in this Court its Statement Opposing Jurisdiction and Motion to Dismiss or Affirm on the ground that the validity of the order of the Commission in this case had been definitely settled by this Court in the cases of

Arkansas Gas Co. v. Department (1938) 304 U. S. 61, 82 L. Ed. 1149 and *Natural Gas Pipe Line Company v. Slattery* (1937) 302 U. S. 300, 82 L. Ed. 276.

However, this Court noted probable jurisdiction in the case on May 19, 1947. (R. 235)

Question Presented

The ultimate question to be decided by this Court is whether the requirements imposed upon Appellant by the order of the Public Service Commission of Indiana dated November 21, 1945 (R. 171 to 173) are invalid as being repugnant to Article 1, Section 8 (3) (Commerce Clause) of the Constitution of the United States.

Additional Statement of the Case

This case began on October 13, 1944 when the Public Service Commission of Indiana, after a summary investigation on its own motion, ordered a formal hearing to determine the extent and manner in which Appellant, Panhandle Eastern Pipe Line Company (hereafter referred to as Panhandle) was distributing natural gas as a public utility to ultimate consumers within the State of Indiana, and whether it was complying with the laws of Indiana in that regard. (R. 116 to 120)

The Commission recited that prior to this investigation it had never been supplied with information as to the activities of Panhandle within the State of Indiana. When the supplying of direct consumer gas service was commenced by Panhandle in Indiana it did not file, and has at no time since filed with the Commission any reports, tariffs or regulations. (R. 125)

Panhandle filed objections to the jurisdiction of the Commission (R. 120). Six local public utility distributing companies who were being supplied gas from Panhandle intervened.[1] (R. 121) Panhandle and the other parties in this case stipulated practically all of the facts before the Commission (R. 123) and based upon said stipulations and other evidence the Commission made its Findings of Facts. (R. 126 to 149).

It was further stipulated by Panhandle and the Appellees in this case that for this appeal the Findings of Facts of the Commission correctly summarized all of the evidence offered before the Commission (R. 231) except as to matters not included therein which are covered by other stipulations filed in these proceedings. (For other stipulations, see R. 35 to 116). At the hearing before the Commission, the following pertinent facts appeared which are recited in the Findings of Facts of the Commission, or appear in other parts of the record in this case.

Panhandle is a Delaware corporation organized in 1929. In 1930 it was admitted to do business in Indiana but this authority was revoked in 1933 because of its failure to file annual reports (R. 40). In 1935 Panhandle was again admitted to do business in Indiana as a foreign corporation. In its articles, it was authorized to engage in the business of transporting natural gas in, into, through and from the State of Indiana and any other State except Delaware; and of supplying gas to other corporations and persons engaged in the business of supplying gas to the public (R. 128).

[1] Central Indiana Gas Company, Greenfield Gas Company, Inc., Kokomo Gas and Fuel Company, Northern Indiana Public Service Company, Public Service Company of Indiana and Southern Indiana Gas and Electric Company.

Panhandle was also authorized in its articles to produce, purchase, store and transmit gas and to sell or otherwise dispose of such gas to corporations and persons, and to acquire and sell all property in the State of Indiana necessary for carrying on its legitimate business. It was further recited in its articles that the business, above described, was for the purpose of interstate commerce only and not that of a public utility business in Indiana (R. 128). The certificate of admission issued in 1935 is still in force and effect. (R. 127)

Prior to 1931, Panhandle had constructed its main transmission line which extended about 1160 miles from the Amarillo Gas Field in the Texas Panhandle and the Hugoton Gas Field in southwestern Kansas through the states of Oklahoma, Kansas, Missouri and Illinois to a point near the Indiana-Illinois state line where it connected at Dana, Indiana, with a line subsequently acquired by Panhandle, running from Dana, Indiana, to Zionsville, Indiana, and from Zionsville, Indiana, to Detroit, Michigan. A branch of this line extended from Zionsville, Indiana, to Muncie, Indiana. All of these lines are presently being operated by Panhandle in Indiana and consist of 22 inch, 24 inch and 26 inch transmission mains, branch lines, dehydrated plants, gasoline plant compressor stations and related facilities incidental to the transmission and delivery of natural gas. (R. 126-127.)

In 1943 Panhandle constructed an additional line running from Liberal, Kansas, to a point 68.8 miles northeast of Zionsville, Indiana, and from a point near Edgerton, Indiana, to a point in Ohio. (R. 127.) The location of these main gas lines, their branches, laterals and related equip-

ment are shown on the map set forth in the Record at page 66.

The aforesaid gas transmission lines and other facilities were constructed or acquired by Panhandle for the purpose of transporting natural gas from the gas fields in Texas and Kansas to the intervening states, including Indiana, and selling such gas directly or indirectly to the public and Panhandle is now engaged, and it, or the companies which it has acquired in Indiana, have been continuously engaged in the furnishing of natural gas in the State of Indiana and elsewhere, directly or indirectly, to all types of consumers, residential, commercial and industrial. (R. 127.)

Approximately 950,000 consumers are supplied directly or indirectly with gas from the entire Panhandle system and Panhandle serves directly 194 residential consumers and 23 industrial consumers. (R. 131; 47.)

In Indiana Panhandle serves directly or indirectly more than 112,000 consumers. It serves directly 7 residential consumers (employees of Panhandle) and 2 large industrial consumers—Anchor-Hocking Glass Corporation at Winchester, Indiana (R. 131), and E. I. DuPont de Nemours at Fortville, Indiana (R. 46, 176).

Panhandle likewise furnishes gas in Indiana to 10 local public utility distributing corporations and 4 municipalities who, in turn, furnish this gas to 97,699 residential consumers, 5,122 commercial consumers and 252 large industrial consumers (R. 132 to 134.)[2]

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[2]Six of these local distributing companies intervened in the proceedings before the Commission to prevent Panhandle from taking away their industrial consumers (R. 136) and appeared in both the Circuit Court of Randolph County, Indiana and the Supreme Court of Indiana to uphold the order of the Commission made in this case (R.23; 196)

From the main transmission lines of Panhandle lateral or branch lines of varying sizes and lengths extend to interconnections with gas lines of these various public utility distributing companies or to the industrial consumers which Panhandle serves direct. (R. 41.) A description of such connections with a typical local public utility distributing company and with an industrial consumer served direct by Panhandle (Anchor-Hocking) is summarized in the opinion of the Supreme Court of Indiana (R. 196 to 197) and is shown in detail in the Record at pages 134 to 135.

Deliveries of natural gas by Panhandle directly to industrial consumers using large quantities of gas and to other gas public utility companies for resale to industrial consumers using large quantities of gas, are, in most instances, subject to curtailment, interruption or discontinuance in the event of an insufficiency in the supply of gas. (R. 134.) This is provided for in the individual contracts made by Panhandle with industrial consumers it serves direct and with local public utility distributing companies, and in the individual contracts made by such local public utility distributing companies with their industrial consumers to whom they furnish gas purchased from Panhandle (R. 45.) (Appellant's Br., p. 14.)

The problem of the necessity of curtailment is the same whether the gas is sold directly by Panhandle to an industrial consumer or to a local public utility distributing company for resale to such consumer and involves consideration of the same elements of pressure, temperature, mechanical conditions of equipment, time of year, time of week and wind velocity. (R. 175.)

In June, 1943, Panhandle informed Kokomo Gas & Fuel Company (an intervenor herein), a local public utility dis-

tributing company in Indiana furnishing gas purchased from Panhandle to Continental Steel Corporation, a large industrial consumer, that in the future it would be the purpose of Panhandle to make all contracts for supplying gas to large industrial consumers, like Continental Steel, direct with such companies thus taking such industrial customers away from the Kokomo company. (R. 136.)

At the same time Panhandle expressed this same intention and purpose to Northern Indiana Public Service Company, Central Indiana Gas Company and others (intervenors herein), all local public utility distributing companies in Indiana purchasing gas from Panhandle for resale to industrial consumers. (R. 136 to 143.)

This same intention and purpose was expressed by Panhandle through its President and Chairman of its Board to the effect that Panhandle was interested in securing directly the industrial customers now served by local public utility distributing companies because this was an unregulated transaction both as to the Federal Power Commission and the Public Service Commission of Indiana and that industrial rates would be established not by public regulation but on a competitive fuel basis. (R. 149.)

Panhandle seeks to sell directly any industrial plant using natural gas in quantities agreeable to Panhandle and not to sell the gas to a public utility distributing company for resale because it is the position of Panhandle that such business is beyond regulation by any regulatory body, thus enabling Panhandle to make as much money from the business as possible. (R. 149.)

If Panhandle carries through such a program and serves all industrial customers in Indiana directly, then the local

public utility distributing companies will be deprived of a total of 252 large industrial consumers in the State of Indiana. (R. 133.)

A compilation taken from the annual reports of the local gas public utilities operating in Indiana under the jurisdiction of the Public Service Commission of Indiana for 1943 shows that of the total gross revenues derived from the sales of gas 62.71% was derived from industrial sales and that industrial consumers represented only 2.8% of the total number of consumers (95% were domestic consumers and 3.76% were commercial consumers). (R. 143.)

If only 3 of the local public utility distributing companies involved were to lose all of the gas revenues classified as industrial sales by reason of Panhandle serving the same directly, it would mean a total loss in gross revenues in excess of four million dollars per year and said companies would only be able to dispense with less than 2% of their gas utility plant properties. (R. 144 to 147.)

The fact that these distributing companies served natural gas to all three classes of gas consumers, i. e., industrial, commercial and domestic, has made possible a high standard of service at lower rates to the consumers in each of the three classes than would have been possible if only one of the classes had been served. It has meant that the residential and commercial customers have had the benefit of natural gas which would have been denied them unless the distributing companies' business had included service to all three classes of consumers. The installation of facilities to serve industrial consumers has made possible the development of domestic uses, including cooking and water heating, the higher B.T.U. gas for house heating and the use of gas for commercial cooking purposes by restaurants,

hotels and others. All of these services under old methods were prohibitive in cost or the gas was not available in the quantities in which the customers wished to use it, due to the inadequacy of facilities and of the supply of gas. (R. 145.)

It was through the development by the distributing companies of the industrial business that they have been able to improve materially the over-all load factor of gas purchased. This has also enabled the distributing companies to spread their fixed costs, such as interest, taxes and depreciation, which are constant in every-day operation, over a larger number of units of service, which automatically has given the benefit of that condition and fact to each of the three classes of consumers and has made possible the development of rates for service which were attractive not only to one of the three classes but to each of them; all of which has had the effect of promoting greater public interest in the area served by these distributing companies in the use of natural gas and in advancing the public welfare in those areas. (R. 145-146.)

The sales in Indiana of gas by local public utility distributing companies to industrial consumers has long been and is now under the jurisdiction of the Public Service Commission of Indiana. (R. 143, 208.) Panhandle contends that once it starts serving such industrial consumers direct, such sales will not be under the jurisdiction of the Public Service Commission of Indiana or under the Federal Power Commission but that competition from other fuels will determine the rates and service for such sales. (R. 149.)

Based upon the foregoing facts, as recited in the Findings of Facts, the Public Service Commission of Indiana made its order of November 21, 1945, requiring Panhandle

to file with it the matters heretofore set forth in this brief at page 2.

Panhandle filed its complaint in the Circuit Court of Randolph County, Indiana, to set aside and enjoin the aforesaid order of the Commission on the ground that it was repugnant to the Commerce Clause of the Constitution of the United States (R. 1 to 21). After the case was tried by the Randolph Circuit Court, Panhandle filed with the Commission a conditional offer agreeing to furnish the information required by the order of the Commission of November 21, 1945, if the Commission would modify that order so as to state unequivocally that the order involved no assertion of jurisdiction or authority by the Commission over the business of Panhandle in selling and delivering gas direct to industrial consumers in Indiana. (R. 179.)

The Commission rejected this conditional offer and declared that the information, if furnished, would be deemed to be on file for use by the Commission for all purposes and uses permitted by the Public Service Commission Act of Indiana (R. 190). These additional facts were brought into the record before the Circuit Court of Randolph County, Indiana (R. 25), which Court on May 11, 1946, entered a judgment setting aside the order of the Commission (R. 30). This judgment was in turn reversed by the Supreme Court of Indiana on February 5, 1947, with instructions to the Randolph Circuit Court to enter judgment denying the relief sought by Panhandle (R. 213).

Pertinent Statutes Involved

All parties in this case agree that Panhandle is subject to the provisions of the Federal Natural Gas Act and to the

jurisdiction of the Federal Power Commission in its sales to public utility companies in Indiana, which resell to ultimate consumers. Section 1 (b) of the Act (52 Stat. 821; 15 U. S. C. A. 717 (b)) provides:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Based upon the above wording of the Act, all parties also agree that sales of gas by Panhandle direct to industrial consumers are excluded from the provisions of said Act and are not subject to the jurisdiction of the Federal Power Commission. Panhandle claims that its direct sales to industrial consumers were excluded because Congress did not deem that Federal regulation was necessary and that state regulation was precluded by the Commerce Clause of its own force (Appellant's brief, pp. 57, 63).

Appellees contend that direct sales to industrial consumers were excluded from the Act because Congress intended them to be regulated by the several states as will be demonstrated in the argument following. In this connection, Section 17p (b) and (c) of the Federal Natural Gas Act (52 Stat. 831; 15 U. S. C. A. 717 p) provides in part as follows:

> "(b) The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regu-

lations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commssion.

"(c) The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. * * *"

Panhandle claims that it is not subject to the provisions of the Public Service Commission Act of Indiana, regulating public utilities because it is not a "public utility" as defined therein. Appellees claim that it is. Section 54-105, Burns 1933, defines, in part, a public utility to be:

"* * * '. . . every corporation . . ., that now or hereafter may own, operate or control any . . . plant or equipment . . . for the . . . transmission, delivery or furnishing of heat, light, water or power . . . either directly or indirectly to or for the public . . .'"

Section 54-601 A, Burns 1945 Supp. (Chapter 53 of Acts of General Assembly of Indiana of 1945) defined in part "gas utility" to be:

"* * * any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers, within the State of Indiana for his, its or their domestic, commercial or industrial use. * * *"

The Supreme Court of Indiana construed these statutes to include the activities of Panhandle in selling direct to

industrial consumers to be within the meaning of the terms "public utility" and "gas utility" (R. 211-213) and such construction is binding upon this Court, as will hereafter be demonstrated in the Argument.

There is no dispute between the parties in this case that the sales of gas by local public utility distributing companies in Indiana to industrial consumers is subject to the Public Service Commission Law of Indiana and to regulation by the Public Service Commission. (R. 208.)

SUMMARY OF ARGUMENT

(1) The order of the Public Service Commission of Indiana attacked in this case did not by its provisions regulate the rates and services of gas furnished by Panhandle direct to industrial consumers, but only required Panhandle to file certain information with the Commission. Such order is, therefore, valid under the case of *Arkansas Gas Co. v. Department* (1938) 304 U. S. 61, 82 L. Ed. 1149, and other related cases.

(2) If the order of the Commission is, as contended by Panhandle, an attempted regulation of the rates and service of Panhandle it is valid.

(3) All parties agree that Congress has not regulated sales by Panhandle direct to industrial consumers and there is, therefore, no conflict between state regulation and Federal regulation in this case. Since Congress has not chosen to enact a nation-wide rule in the matters here in question, the power of the State to regulate will not be denied.

(4) The incidence of the particular type of State action here involved throws the balance of any conflict be-

tween local needs and the requirement of freedom for national commerce, in support of the local needs because interference with the national interest in this case is remote and unsubtantial.

(5) The police regulation by the State of Indiana in this case of local aspects of interstate commerce is essential to safeguard vital local interests which are present in this case.

(6) The nature of the State regulation here involved, the objective of the State, and the effect of the regulation upon the national interest in interstate commerce all tend to support the order of the Commission in this case.

(7) The emphasis on the facts and practical considerations in this case, rather than dogmatic logistic, clearly indicates that the State regulation here involved is valid.

(8) The decisions of this court involving State regulation of natural gas companies in their activities similar to those involved in this case all support the order of the Public Service Commission of Indiana here attacked.

(9) The adoption by Congress of the Federal Natural Gas Act, and the nature of its provisions, clearly show that Congress did not intend to regulate the matters here involved, but did intend that such matters be regulated by the states.

(10) Panhandle, in selling gas direct to industrial consumers, is a public utility whose business is effected with the public interest under the declaration of Congress in the Federal Natural Gas Act, under the statutes of the State of Indiana, and under the cases decided by this court.

(11) The Commerce Clause of its own force does not preclude the State regulation here involved since national uniformity of regulation is not required, nor does the regulation here involved impede or block interstate commerce.

(12) The impact of a decision in this case holding that Panhandle is wholly free from any regulation, either by the Federal government or by the states in its direct sales to industrial consumers, will completely upset the regulation by the state of Indiana of the natural gas business and cause irreparable damage to the 112,000 natural gas consumers in the State of Indiana.

ARGUMENT

I

Scope of the Commission's Order

Panhandle in its brief (p. 6) has assumed that the order of the Public Service Commission of Indiana in this case constitutes an attempted regulation by the Commission of Panhandle's rates and services in furnishing natural gas direct to industrial consumers in Indiana and therefore violates the Commerce Clause of the United States Constitution. As pointed out in the Additional Statement of The Case herein at page 11 of this brief the order of the Commission merely *required* appellant to file certain information with the Commission including (1) its schedule of rates charged all ultimate consumers in Indiana, (2) its annual reports and, (3) other reports and data. (R171-173)

The order of the Commission did not fix any rates or standards of service nor did it contemplate a hearing on said matters. All that the order required of Panhandle was the filing with the Commission of the matters above set forth. It is true that there are general assertions by the Commission in its opinion accompanying the order that it was the position of the Commission that it could regulate the rates and services of Panhandle. However, the Commission finally stated that when such information was filed with it by Panhandle such information would be deemed to be on file for use by the Commission for all purposes and uses permitted by the Public Service Commission Act of Indiana (R. 190).

The recent expression by this Court in the case of *Rice v. Board of Trade* (1947) 91 L. Ed. Adv. op. 1058 at p. 1062 appears to be appropos this question:

> "Respondents' claim of supersedure is, therefore, premature. Until it is known what rules the Illinois Commission will approve or adopt, it cannot be known whether there will be any conflict with the federal law. Any claim of supersedure can be preserved in the state proceedings. And the question of supersedure can be determined in light of the impact of a specific order of the state agency on the Federal Act or the regulations of the Secretary thereunder. Only if that procedure is followed can there be preserved intact the whole state domain which in actuality functions harmoniously with the federal system. For even action which seems pregnant with possibilities of conflict may, as consummated, be wholly barren of it."

The Commission's order in this case is indistinguishable from the order which was held valid by this Court in the case of *Arkansas Gas Co. v. Department* (1938), 304 U. S. 61, 82 L. Ed. 1149, and which applied to a natural gas corporation doing substantially the same business as Panhandle in this case. This Court in holding the order valid said (304 U. S. 63):

> "The question for present determination is whether this general order, valid under the laws of the State, which only compels appellant to file certain designated information, amounts to an infringement of any right or privilege guaranteed to it by the Federal Constitution. And to this a negative answer must be given.
>
> "If, as claimed, certain of appellant's activities in Arkansas are parts of interstate commerce, that alone (and no other defense is relied upon) would not

suffice to justify refusal to furnish the information presently demanded by the State."

This same principle has recently been announced by this Court in *Champlin Refining Co. v. United States* (1946) 91 L. Ed. (Adv. op.) 9, 12. Applying the principles of the foregoing cases to the present case the order of the Indiana Commission in this case is valid.

II

Validity of Commission Order As a Regulation of Rates and Service.

Assuming the order attacked in this case to be one attempting to regulate the rates and service of natural gas furnished by Panhandle direct to industrial consumers, the only question is whether that order violates Article 1, Section 8 (3) (Commerce Clause) of the Constitution of the United States.

While some argument might well be made in support of the proposition that the business of Panhandle involved in this case constitutes intrastate commerce and not interstate commerce, (R. 134-135, 201), appellees, Public Service Commission of Indiana, believe that under the decisions of this Court the order of the Commission is valid even assuming Panhandle's business in serving industrial consumers directly to be interstate commerce.

A

Approach To The Question

This Court spoke recently in two cases, *(Freeman v. Hewitt* (1946), 329 U. S. 249, 91 L. Ed. (Adv. Op.) 205)

and *(Prudential Ins. Co. v. Benjamin* (1945), 328 U. S. 408, 90 L. Ed. 1342), one arising from Indiana; of the long continuous process of judicial adjustment involving the power of the states to regulate on matters involving interstate commerce and the limitations upon that power imposed by the Commerce Clause of the Federal Constitution. It recognized that the need for such adjustment was inherent in our form of government where the same transaction concerns the interests and involves the authority of both the central government and of the constitutent states. It noted the impossibility of harmonizing all of the decisions on this question and stated that the opinions in this field must be read in the setting of the particular cases and as a preoccupation with their special facts.

In these cases also this Court indicated the approach or starting point which should be made in deciding cases arising in this field. On the one hand this Court recognized the principle which it had applied in two recent cases[3] that the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the State (hereafter discussed in this brief p. 56). On the other hand this Court recognized a broader and more liberal principle when matters of police regulation by a state are involved. In the *Freeman* case this Court said: (91 L. Ed. (Adv. Op.) 208):

> "These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations

[3] *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 89 L. Ed. 1915; *Morgan v. Virginia*, 328 U. S. 373, 90 L. Ed. 1317.

of police power in the conventional sense. But, in the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incident of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. *A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State.* The Minnesota Rate Cases *(Simpson v. Shepard)*, 230 U. S. 352, 402 et seq., 33 S. Ct. 729, 741, 57 L. Ed. 511, 48 L.R.A., N.S., 1151, Ann. Cas. 1916A, 18; *South Carolina State Hwy. Dept. v. Barnwell Bros.*, 303 U. S. 177, 625, 58 S. Ct. 510, 82 L. Ed. 734; *Union Brokerage Co. v. Jensen*, 322 U. S. 202, 209-212, 64 S. Ct. 967, 972-973, 88 L. Ed. 1227, 152 A.L.R. 1072. * * *" (Our italics)

In the Minnesota Rate Cases *(Simpson v. Shepard)*, 230 U. S. 352, 402 *et seq.* 57 L. Ed. 511 cited in the above quote from the *Freeman* case, this Court said (230 U. S. 402):

"But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. * * * Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provision for

> local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own. The successful working of our constitutional system has thus been made possible."

And in the case of *South Carolina Highway Department v. Barnwell Bros.* (1938) 303 U. S. 177, 82 L. Ed. 734, also cited in the above quote from the *Freeman* case this Court said (303 U.S. 184-185):

> "While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints."

Likewise, in the case of *Illinois Gas Co. v. Public Service Co.* (1941) 314 U.S. 498, 86 L. Ed. 371, this Court said (314 U.S. 505):

> "In other cases, the Court, in determining the validity of state regulations, has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce. Cf. *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185, 187, *et seq.*; *California v. Thompson*, 313 U.S. 109, 113, 114; *Duckworth v. Arkansas*, ante, p. 390. Thus, in *Pennsylvania Gas. Co. v. Public Service Commission*, 252 U.S. 23, where natural gas was transported by pipe line from one state into another and there sold directly to ultimate local consumers, it was held that, although the sale was a part of interstate commerce, a state public service commission could regulate the rates for service to such consumers. While the Court recognized that this local regulation would to some extent affect interstate commerce in gas, it was thought that the control of rates was a matter so peculiarly of local concern that the regulation should be deemed within state power. Cf. *Arkansas Louisiana Gas Co. v. Dept. of Public Utilities*, 304 U. S. 61. * * *"

Finally, in *Prudential Insurance Co. v. Benjamin* (1945), 328 U.S. 408; 90 L. Ed. 1342 this Court said (328 U.S. 420):

> "Moreover, the parallel encompasses the latest turn in the long-run trend. For concurrently with the broadening of the scope for permissible application of federal authority, the tendency also has run toward sustaining state regulatory and taxing measures formerly regarded as inconsonant with

Congress' unexercised power over commerce, and to doing so by a new, or renewed, emphasis on facts and practical considerations rather than dogmatic logistic. These facts are of great importance for disposing of such controversies. For in effect they have transferred the general problem of adjustment to a level more tolerant of both state and federal legislative action."

B

Principles To Be Applied.

From the foregoing cases we learn that the following principles become important in determining the validity of state regulation of the type here involved:

(1) Until Congress chooses to enact a nation-wide rule, the power will not be denied to the State.

(2) In the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial.

(3) A police regulation of local aspects of interstate commerce is a power often essential to a state in safeguarding vital local interests.

(4) This Court has been less concerned to find a point in time and space where interstate commerce ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce.

(5) The tendency is toward sustaining state regulation formerly regarded as inconsonant with Congress' unexercised power over commerce by an emphasis on facts and practical considerations rather than upon dogmatic logistic.

It is submitted that the foregoing principles apply to the present case as shown by the Record and have been applied by this Court in its decisions involving the regulation of gas companies doing a business similar to Panhandle in the instant case as will now be shown.

C

Application of Principles to This Case

Absence of Congressional Action.

Panhandle in its brief (p. 57) concedes that Congress has not acted to regulate direct sales by it to industrial consumers under the Federal Natural Gas Act or otherwise, so there is no question but that Congress has not chosen to enact a nation wide rule governing the sales by companies like Panhandle direct to industrial consumers. The first test for supporting state regulation is therefore statisfied.

Competing Demands of State and National Interests

Since Congress has not acted to regulate the activity of Panhandle herein involved there is no conflict between Federal regulation and the regulation of the State of Indiana and thus no competing demands of State and Federal government to be accommodated. Panhandle's claim that the state regulation herein involved conflicts with the national interest of uniformity will be hereafter separately discussed in this brief at page 56.

Regulation to Protect Vital Local Interests

This Court has recognized that a police regulation of local aspects of interstate commerce is a power often essential to a state in safeguarding vital local interests. This principle is certainly applicable here. As shown by the Record in this case, Panhandle operates a network of natural gas pipe lines in Indiana (R. 126-127) which are illustrated by the map on page 66 of the Record.

From these pipe lines Panhandle serves gas to 7 residential consumers (employees of Panhandle), 2 large industrial consumers—Anchor-Hocking Glass Corporation at Winchester, Indiana, and DuPont at Fortville, Indiana (R. 131, 176), and 14 independent local public utility distributing companies who resell this gas to 97,699 residential consumers, 5,122 commercial consumers and 252 large industrial consumers (R. 132-134). There are a total of 112,000 consumers who are furnished gas directly or indirectly by Panhandle in Indiana.

While Panhandle now serves only two industrial consumers direct (Anchor-Hocking and DuPont) it has announced its policy and purpose to secure and serve direct the other 252 industrial consumers which are now being served by the 14 local public utility distributing companies in Indiana (R. 136-149). If such a program is carried out these local distributing companies stand to lose 62% of their total gross revenues while only being able to dispense with 2% of their plant property. (R. 144-147) This will result in higher rates and lower service to their residential and commercial consumers (R. 145).

At the present time the rates and service of gas furnished by Panhandle to these local public utility distribut-

ing companies are regulated by the Federal Power Commission under the Federal Natural Gas Act, and the rates and service of gas furnished by these distributing companies to their industrial consumers are regulated by the Public Service Commission of Indiana. Thus, in these sales there is a complete and complementary scheme of regulation, Federal and State, working together.

Yet as to those industrial consumers served direct by Panhandle it is the contention of Panhandle that they are not subject to regulation either by the Federal Power Commission or by the Public Service Commission of Indiana. As to these there is a complete *absence* of regulation, Federal and State. Therefore, industrial consumers in Indiana will be in two conflicting groups (1) Those served by Panhandle without any regulation whatsoever and (2) those served by local distributing companies with gas furnished by Panhandle with complete regulation by the Federal and State governments working together. Such a result will completely upset the regulatory scheme in Indiana.

The foregoing facts which are set forth in greater detail at page 9, this brief, on their face show, without need of further argument, the vital local interests necessary to be protected in Indiana. The necessity for the protection of these local interests coupled with the complete absence of the adoption by Congress of any nation wide rule preventing state regulation becomes an important practical consideration in disposing of this case and should override any dogmatic logistic. Likewise, the impact of the foregoing facts throws the balance of any conflict between national and state interest in support of local regulation because the interference with the national interest

becomes remote and insubstantial, in comparison, as will be hereafter shown. (This brief p. 62.)

Nature of Regulation, Objective of State.

This Court has been less concerned as to whether the activity involved is interstate or intrastate commerce and has looked to the nature of the state regulation, the objective of the state and the effect of the regulation upon the national interest in commerce. The nature of the regulation here involved, assuming that it purports to regulate rates and service of gas furnished to industrial consumers direct by Panhandle, is to protect all of the consumers of natural gas in Indiana and to insure that all industrial consumers in Indiana are placed upon a substantially equal basis as to rates and service. Likewise, it is to protect and preserve the present system in Indiana of regulating the furnishing of natural gas to ultimate consumers.

Furthermore, it is the objective of the State to provide for that regulation of natural gas companies which is not provided for by the Federal government under the Federal Natural Gas Act so that in the last analysis there is a complete and comprehensive scheme of regulation, both Federal and State, working together. This purpose and objective is wholly consistent with the theory of the Federal Natural Gas Act so accurately described by this Court in *Public Utilities Commission v. United Fuel Gas Co.*, 317 U.S. 456; 87 L. Ed., 396, where the Court said (317 U.S. 467):

> "It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The

Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2nd Sess., pp. 1-3; H. Rep. No. 709, 75th Cong., 1st Sess., pp. 1-4; Sen. Rep. No. 1162, 75th Cong., 1st Sess."

The purpose of the regulation here in question and objective of the State is entirely in accord with the theory of the Federal Natural Gas Act and absolutely necessary to protect the vital local interests of the State of Inidana.

Emphasis of Facts of Case.

This Court has said that the tendency is toward sustaining State regulation, formerly regarded as inconsonant with Congress' unexercised power over commerce, by an emphasis on facts and practical consideration rather than dogmatic logistic. The foregoing facts and practical considerations discussed above require the application of this principle and compel the support of the type of regulation here involved.

D

Foregoing Principles Were Applied In Gas Company Decisions of This Court.

The prinicples above discussed have been applied specifically by this Court in cases involving the regulation by the States of natural gas companies, and these decisions support the State regulation involved herein.

The first pertinent case decided by this Court involving state regulation of gas companies was *Public Utilities Commission v. Landon* (1919) 249 U.S. 236, 63 L. Ed. 577. There natural gas was transported interstate by the Receiver of a pipe line company to local distributing companies for resale by them to ultimate consumers. This Court held that the sales of gas to local distributing companies for resale was interestate commerce and not subject to regulation by the State, but that sales by the distributing companies to ultimate consumers could be regulated by the State.

In the case of *Pennsylvania Gas Company v. Public Service Commission* (1920), 252 U.S. 23, 64 L. Ed. 434, this Court held valid an order of the New York Public Service Commission regulating the rates for sales of gas direct by the Pennsylvania Company to ultimate domestic and factory consumers in certain cities in New York. This gas was gathered in Pennsylvania by the company and transported in interestate commerce direct to such consumers (not through a distributing company) and this Court held that such sales were in interstate commerce. Nevertheless, this Court held that the State of New York could regulate the rates for such sales. On this matter this Court said (252 U.S. 28):

> "In the instant case the gas is transmitted directly from the source of supply in Pennsylvania to the consumers in the cities and towns of New York and Pennsylvania, above mentioned. Its transmission is direct, and without interventon of any sort between the seller and the buyer. The transmission is continuous and single and is, in our opinion, a transmission in interstate commerce and therefore subject to applicable constitutional limita-

tions which govern the States in dealing with matters of the character of the one now before us."

And again this Court said (252 U. S. 30-31):

"The thing which the State Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown in the State of New York. The pipes which reach the customers served are supplied with gas directly from the main of the company which brings it into the State, nevertheless the service rendered is essentially local, and the sale of gas is by the company to local consumers who are reached by the use of the streets of the city in which the pipes are laid, and through which the gas is conducted to factories and residences as it is required for use. The service is similar to that of a local plant furnishing gas to consumers in a city.

"This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest and has not been attempted under the superior authority of Congress.

"It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the State from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress enabling it to exert its superior power under the commerce clause of the Constitution.

"The principles announced, often reiterated in the decisions of this court, were applied in the judgment affirmed by the Court of Appeals of New York, and we agree with that court that, until the subject-matter is regulated by congressional action, the exercise of authority conferred by the State upon the Public Service Commission is not violative of the commerce clause of the Federal Constitution."

Further, this Court had occasion to interpret its holdings in both the *Landon* case and *Pennsylvania Gas Company* case, when it decided the case of *Missouri ex rel. Barrett v. Kansas Natural Gas Co.* (1924), 265 U.S. 298, 68 L. Ed. 1027. In that case this Court reaffirmed its holding in the *Landon* case to the effect that the State could not regulate the sales by gas pipe line companies to distributing companies for resale. However, in speaking of its holdings in the *Landon* and *Pennsylvania Gas Company* cases it said (265 U.S. 309):

"In both cases the things done were local and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the *Landon Case.* The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance. But here the sale of gas is in wholesale quantities, not to consumers, but to distributing companies for resale to consumers in numerous cities and communities in different States. * * *"

In 1942 this Court again interpreted its holding in the *Landon* case and *Pennsylvania Gas Co.* case when it decided the case of *Illinois Natural Gas Company v. Central Illinois Public Service Company* (1942) 314 U.S. 498, 86 L. Ed. 371. In this case this Court held that the Federal Natural Gas Act precluded state regulation of sales by gas pipe line companies to distributing companies for resale. In speaking of the *Landon* and *Pennsylvania Gas Company* cases this Court said (314 U.S. 505):

> "In other cases, the Court, in determining the validity of state regulations, has been less concerned to find a point in time and space where the interstate commerce in gas ends and intrastate commerce begins, and has looked to the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce. Cf. *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 185, 187, *et seq.*; *California v. Thompson*, 313 U.S. 109, 113, 114; *Duckworth v. Arkansas, ante*, p. 390. Thus, in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23, where natural gas was transported by pipe line from one state into another and there sold directly to ultimate local consumers, it was held that, although the sale was a part of interstate commerce, a state public service commission could regulate the rates for service to such consumers. While the Court recognized that this local regulation would to some extent affect interstate commerce in gas, it was thought that the control of rates was a matter so peculiarly of local concern that the regulation should be deemed within state power. Cf. *Arkansas Louisiana Gas Co. v. Depart. of Public Utilities*, 304 U.S. 61. • • •"

It is submitted that the reasoning of this Court and its decision in the *Pennsylvania Gas Co.* case (252 U.S. 23),

as interpreted by this Court in the later decisions just discussed above, are applicable to the instant case and support the order of the Commission here involved. Although this Court decided that the furnishing of gas to ultimate consumers in the *Pennsylvania Gas Co.* case was interstate commerce this Court held that the rates to be charged for such sales to ultimate consumers could validly be regulated by the Public Service Commission of New York.

Here we have the same situation. Panhandle is furnishing gas direct (without any distributing company) to industrial consumers in Indiana which activity constitutes interstate commerce yet since these industrial consumers are ultimate consumers the State of Indiana has a right to regulate the rates and service to them because the matter then becomes local under the principles recited in the *Pennsylvania Gas Co.* case.

This interpretation is supported by Prof. Thomas Reid Powell in an article in 58 Harvard Law Review 1072, where he said at page 1082:

> "Nevertheless the Supreme Court has from the beginning allowed the state both to tax and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also necessarily the last sale because consummated by consumption."

In support of such statement Professor Powell cited *Public Utilities Commission v. Landon* (1919), 249 U.S. 236, 63 L. Ed. 577; *Pennsylvania Gas Co. v. Public Service Commission* (1920), 252 U. S. 23; 64 L. Ed. 434; *East Ohio Gas Co. v. Tax Commission* (1931), 283 U.S. 465, 75 L. Ed. 1171; *Southern Natural Gas Corp. v. Alabama* (1937), 301 U.S. 148, 81 L. Ed. 970.

Panhandle does not question the result in the *Pennsylvania Gas Co.* case, (Brief p. 27), but seeks to distinguish that case from the present one on the ground that it did not involve direct sales in wholesale quantities to industrial consumers under individual contracts but dealt only with local distribution by the pipe line company of the same character as that made by local distributing companies in the *Landon* case. (Brief, p. 25) Panhandle is in error in such statement.

The sales in the *Pennsylvania Gas Co.* case were *direct* sales from company to consumer without the intervention of a distributing company. The consumers in that case were domestic and *factory* consumers. (252 U.S. 31). It does not appear in that case whether the amounts furnished to such factories were in such amounts as Panhandle would consider to be "wholesale" but certainly such gas was not furnished at wholesale in the sense of "for resale" any more than in the instant case.

It is difficult to understand what difference it makes whether gas is furnished in wholesale or large amounts direct to ultimate consumers or whether it is furnished to them in smaller amounts. In both cases it is consumed just as effectively, and the consumption is just as local in either case. The only time the furnishing of gas at "wholesale" makes any difference is when it is so furnished to public utility distributing companies for resale which sales are then subject to the provisions of the Federal Natural Gas Act. In that situation the term "wholesale" is used in its ordinary meaning of "for resale".

It does not appear in the *Pennsylvania Gas Co.* case under what kind of contracts the consumers were served, whether individual or otherwise. But this fact obviously

would not have changed the result in that case, The matter of whether the individual contracts in this case preclude Panhandle from being a Public Utility is discussed in this brief at page 49, and the matter of curtailment of service is discussed in this brief at page 62.

Likewise, Panhandle's statement that the *Pennsylvania Gas Co.* case dealt only with local distribution of the same character as that made by local distributing companies in the *Landon* case is in error. This Court specifically stated in the *Pennsylvania Gas Co.* case that the situation was different from the *Landon* case wherein it had held the activity of furnishing gas by local distributing companies to ultimate consumers to be *intrastate* commerce and subject to state control. (252 U.S. 28). In the *Pennsylvania Gas Co.* case this Court held the activity (which is identical with that in the instant case) to be *interstate* commerce yet also subject to state control.

It is true that in the *Pennsylvania Gas Co.* case this Court held that the service furnished by the company was similar to that of a local plant furnishing gas to a consumer. (252 U.S. 31). So is the service furnished by Panhandle in this case direct to industrial consumers similar to that furnished by local distributing companies to industrial consumers in Indiana. As a matter of fact before Panhandle started serving Anchor-Hocking in this case it had been served by Indiana Gas Distribution Corporation, a local distributing company, which purchased gas from Panhandle and resold it to Anchor-Hocking. (R. 50-51.)

Also the 14 local public utility distributing companies in Indiana purchasing gas from Panhandle serve directly 252 industrial consumers in Indiana (R. 133) and furnish to them a total amount far in excess of the amount fur-

nished by Panhandle to Anchor-Hocking. (R. 132, 35). Likewise, the service furnished by local distributing companies to industrial consumers is exactly like that furnished by Panhandle to industrial consumers on the matter of curtailment of service (R. 45, 175) and individual contracts. (App. Brief. pp. 36, 14.)

It therefore appears that the service furnished by Panhandle direct to industrial consumers is similar to the service furnished by local public utility distributing companies in Indiana to industrial consumers and should be subject to regulation by the State of Indiana the same as the service furnished by these local distributing companies to industrial consumers.

As heretofore shown, the holding and reasoning in the *Pennsylvania Gas Co.* case, as later followed by the decisions of this Court, may not be effectively distinguished from the present case, and such case, it is submitted, is decisive of the question here involved.

In addition to the foregoing cases this Court has held that the furnishing of gas by interstate pipe line companies direct to industrial consumers was local to the extent of supporting a taxing of such activity by the States. (*East Ohio Gas Company v. Tax Commission* (1931), 283 U.S. 465, 75 L. Ed. 1171; *Southern Natural Gas Corp v. Alabama* (1937), 301 U.S. 148, 81 L. Ed. 970.)

Certainly, if this Court has sustained a state tax upon activity similar to that engaged in by Panhandle in this case, this Court would sustain a police regulation of the type herein involved for as indicated in the *Freeman* case (91 L. Ed. (Adv. Op.) 208):

> "• • • Because the greater or more threatening burden of a direct tax on commerce is coupled with

> the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. * * *"

The foregoing cases decided by this Court sustaining state regulation of natural gas pipe line companies clearly support the type of state regulation involved in this case.

E

Natural Gas Act Supports Order in This Case.

As demonstrated previously in this brief the principles which this Court has utilized to test the validity of state regulation of matters involving interstate commerce apply to the present case to support the validity of the Commission's order attacked by Panhandle. Likewise, it has been shown that the decisions of this Court specifically dealing with natural gas pipe line companies and with the type of regulation involved in the present case support the order of the Commission. These results are confirmed by the enactment by Congress of the Federal Natural Gas Act.

The Federal Natural Gas Act was enacted by Congress in 1938 and amended in 1942. (52 Stat. 821 *et seq.* 15 U.S.C.A. 717 *et seq.* Section 1 (a) of this law (52 Stat. 821) 15 U.S.C.A. 717 (a) declares:

> "* * * that the business of transporting and selling natural gas for ultimate distribution to the public is affected with the public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

Section 1(b) of the law (52 Stat. 821; 15 U.S.C.A. 717 (b)) provides:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

From the foregoing provisions of the law it is clear that the only *sales* of natural gas subject to the law are those for resale. Specifically it does not apply to any other sales which definitely excludes from its operation direct sales to large industries for their own consumption.

The statute followed the decided cases heretofore discussed holding that the states could not regulate the sale of natural gas from interstate pipe lines to local utilities for resale. (*Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.* (1924) 265 U.S. 298, 68 L. Ed. 1027; *and Public Service Commission* v. *Attleboro Steam & Electric Co.* (1927) 273 U.S. 83; 71 L. Ed. 549).

Likewise, it had been established by the decisions of this Court heretofore discussed, that the states did have jurisdiction over sales of natural gas from interstate pipe lines direct to ultimate consumers even though the gas came directly from interstate pipe lines. *Public Utilities* v. *Landon* (1919) 249 U.S. 236, 63 L. Ed. 577; *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U.S. 23, 64 L. Ed. 434; *Missouri ex rel. Barrett* v. *Kansas*

Natural Gas Co. (1924) 265 U.S. 298, 68 L. Ed. 1027; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Company* (1942) 314 U.S. 498, 86 L. Ed. 371).

The statute therefore served to affirm and implement the rights of control which the cases had already established. That this was the intent of Congress is shown by the legislative history of the Act and recognized in the decisions of this Court. (*Public Utilities Commission of Ohio* v. *United Fuel Gas Co.* (1943) 317 U.S. 456, 467, 87 L. Ed. 396; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.* (1942) 314 U.S. 498, 506, 507, 86 L. Ed. 371; *Colorado Interstate Gas Co.* v. *Federal Power Commission* (1944) 324 U.S. 581, 600-601, 89 L. Ed. 1206; *Federal Power Commission* v. *Hope Natural Gas Co.* (1943), 320 U.S. 591, 609-610; 88 L. Ed. 333).

Referring to the legislative history of the Act and speaking of the scheme of the regulation intended by the Natural Gas Act, this Court said in *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.* (317 U.S. 467):

> "It is clear, as the legislative history of the Act amply demonstrates, that Congress meant to create a comprehensive scheme of regulation which would be complementary in its operation to that of the states, without any confusion of functions. The Federal Power Commission would exercise jurisdiction over matters in interstate and foreign commerce, to the extent defined in the Act, and local matters would be left to the state regulatory bodies. Congress contemplated a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere. See H. Rep. No. 2651, 74th Cong., 2d Sess., pp. 1-3; H. Rep. No. 709, 75th Cong., 1st Sess., pp. 1-4; Sen. Rep. No. 1162, 75th Cong., 1st Sess."

Report No. 709, 75th Congress, 1st Session, referred to in the above quotation from the *United Fuel Gas Co.* case, *supra*, reads as follows:

> "It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibtion subject to State regulation. (See *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U.S. 23.) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. (See *Missouri* v. *Kansas Gas Co.* (1924), 265 U.S. 298, and *Public Utilities Commission* v. *Attleboro Steam & Electric Co.* (1927), 273 U.S. 83.) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

The foregoing quoted report was again referred to by this Court in *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 506, 86 L. Ed. 371.

Quite recently this Court again referred to the history and purpose of the Federal Natural Gas Act in the case of *Interstate Natural Gas Co.* v. *Federal Power Commission*, (1947), 91 L. Ed. (Adv. Op.) 1355, and said (p. 1359):

> "As was stated in the House Committee report, the 'basic purpose' of Congress in passing the Natural Gas Act was 'to occupy this field in which the Supreme Court has held that the States may not act.' In denying the Federal Power Commission jurisdiction to regulate the production or gathering of natural gas, *it was not the purpose of Congress to free companies such as petitioner from effective public control.* The purpose of that restriction was, rather, to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act. Thus the House Committee Report states: 'The bill takes no authority from State Commissions, and is so drawn as to complement and in no manner usurp State regulatory authority.' * * *" (Our italics.)

This Court held in that case that sales made by a natural gas producing company in the field to pipe line companies which transport the purchased gas to markets in other states constitute sales for resale in interstate commerce and are thus subject to the provisions of the Federal Natural Gas Act. This Court indicated in the above quote, however, that the state could validly regulate sales though technically consummated in interstate commerce, made during the course of production and gathering which were so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent, or a substantial interference with the exercise by the state of its regulatory functions. This Court then pointed out in that case that there was no

indication in the Record that regulation by the Federal Power Commission would conflict with state regulation.

In the present case we are not dealing with regulation by the state of production and gathering but with the other end of the process—ultimate consumption. However, if the state may regulate the beginning of the process (production and gathering) by the same reasoning they should be able to regulate the end of the process. (Ultimate consumption). All parties herein agree that the middle part of the process, transportation and sales for resale, are subject to the provisions of the Federal Natural Gas Act and also that sales direct to industrial consumers do not involve sales for resale and are not subject to the provisions of the Federal Natural Gas Act.

On the matter of conflict of regulation between the Federal government and the State of Indiana in this case we have the reverse of the situation in the *Interstate* case, *supra*. In this case all parties agree that there is no regulation by the Federal Power Commission of direct sales by Panhandle to industrial consumers, so there is no conflict with the regulation by the State of Indiana here involved. Unless and until Congress adopts a law authorizing the Federal Power Commission to regulate the type of activity involved in this case there is no conflict between the Federal and State regulation and such State regulation should be sustained.

That Congress further did not intend to disturb State regulation is further indicated in Section 17 p (b) and (c) (52 Stat. 831; 15 U.S.C.A. 717 p) of the Federal Natural Gas Act which provides in part as follows:

"The Commission may confer with any State commission regarding rate structures, costs, accounts, charges, practices, classifications, and regulations of natural-gas companies; and the Commission is authorized, under such rules and regulations as it shall prescribe, to hold joint hearings with any State commission in connection with any matter with respect to which the Commission is authorized to act. The Commission is authorized in the administration of this chapter to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission.

"The Commission shall make available to the several State commissions such information and reports as may be of assistance in State regulation of natural-gas companies. * * *"

This fact was recognized by this Court as important recently in the case of *Rice* v. *Board of Trade* (1947), 91 L. Ed. (Adv. Op.) 1058, at 1062:

"* * * Moreover the provision in § 12 of the Act that the Secretary 'may cooperate with any department or agency of the Government, any State * * * or political subdivision thereof' supports the inference that Congress did not design a regulatory system which excluded state regulation not in conflict with the federal requirements. See Townsend v. Yeomans, 301 U.S. 441, 454, 57 S.Ct. 842, 848, 81 L.Ed. 1210; Union Brokerage Co. v. Jensen, 322 U.S. 202, 209, 64 S.Ct. 967, 972, 88 L.Ed. 1227."

Panhandle, in its brief (pp. 57 to 65) states that the Federal Natural Gas Act in no way changed the situation here in question. It contends that prior to the Act the Commerce Clause of its own force precluded state regulation of the type here involved and that the Act did not

authorize the states to regulate such activity. We believe that we have completely answered this contention in the preceding discussion herein of our interpretation of the legislative history of the Federal Natural Gas Act.

In support of its position that direct sales by it to industrial consumers were intended by Congress to be completely free of all regulation, Federal and State, Panhandle cites in its brief (pps. 62, 22, 51, 61, 62 and 65) the Report of the Committee on Interstate and Foreign Commerce of the House of Representatives on Amending the Natural Gas Act submitted to the House on July 7, 1947 (Report No. 800, 80th Cong. 1st Sess.).

An examination of the text of the report quoted by Panhandle in its brief at pages 51 to 53 and 62 to 63 and of the factual and legal basis for such text as shown in the hearings before such Committee, preceding its report, clearly shows its pepper-corn value in determining the intention of Congress in enacting the Federal Natural Gas Act, nine years before the issuance of this report.

On the *last* day (May 29, 1947) of the hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on Amendments To The Natural Gas Act,[5] Mr. John Benton, representing the National Association of Railroad and Utility Commissioners submitted amendments to the Federal Natural Gas Act to make it clear beyond the proverbial "shadow of a doubt" that Congress intended to leave the matter of regulation of direct sales to industrial consumers by interstate pipe line companies to the states. (Hearings, pp. 634 to 660).[5] Mr.

[5] Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 2185, H.R. 2235, H.R. 2292 and H.R. 2956 (April-May, 1947).

Benton submitted a written statement in support of these amendments including a copy of the opinion of the Indiana Supreme Court which is now before this Court in this case. (Hearings, pp. 656 to 660).[5]

On the same day the Committee received a long letter from John S. L. Yost, General Attorney for Panhandle Eastern Pipe Line Company, who is one of the attorneys representing Panhandle in this very case, opposing these amendments. In his letter Mr. Yost presents practically the same arguments and authorities which he has utilized in his brief in this case. (Hearings,[5] pp. 696-700). This whole matter was presented to the Committee by Mr. Benton and Mr. Yost just ten days after this Court noted probable jurisdiction in this case. (May 19, 1947.) Later, Mr. Benton replied to Mr. Yost's letter and it was filed with the Committee. (Hearings, pp. 716-718.) We have been unable to find from an examination of the record of the Hearings[5] that any other evidence was before the Committee except the arguments of Mr. Yost and Mr. Benton as above indicated.

Thereafter, the Committee made its report as hereinbefore mentioned and said (Report of the Committee on Interstate and Foreign Commerce of the House of Representatives on Amending the Natural Gas Act; No. 800, 80th Cong., 1st Sess.; page 10):

> "The bill makes no change in the present law as to direct sales by pipe lines to industrial consumers, which sales, under the Natural Gas Act, are exempt from Federal Power Commission jurisdiction. Your committee feels that no change is necessary in the public interest.

"Your committee has considered the amendment offered by the National Association of Railroad and Utility Commissioners, proposing to permit the various States to exercise jurisdiction over direct sales, and has concluded that the adoption of the amendment would not be in the public interest but would be more likely to add to the existing confusion.

"The pipe line does not occupy a utility status with reference to direct sales. By the regulation of the utilities which serve him, the small consumer who goes about his day's work is protected from exorbitant rates, but direct sales are made to business, factories, etc. They are sales at arm's length. The purchaser is engaged in the business of securing fuel at the lowest possible price. He is his own protection. He does not need the aid of a regulating authority. Competition is the proper arbiter of prices in such direct sales. As in other businesses under our competitive system of free enterprise, this problem should be left to the businessmen themselves, to the pipe lines and their customers. They know the business and deal with each other on a fair-bargaining basis.

"Your committee feels that to alter the present situation would present a chaotic situation. If the States were given jurisdiction over direct sales by a pipe line traversing several States, it would be under a dual system of control by the Federal Power Commission and the States. There is no assurance of uniformity of treatment by the different states. The power to regulate direct sales would include the power of curtailment and interruption of service. The different States would conceivably have different views on the matter of curtailment and interruption regardless of its affect on the needs for gas in other States. Curtailment and interruption of service concerns more than one State and endless confusion and conflict would arise between

different States demanding gas as between States and the pipe lines. Also it is conceivable that conflicts would arise between the Federal Power Commission jurisdiction as against the demands of the States to regulate prices, to interrupt service and to curtail service.

"It is not necessary to exercise regulatory controls over direct sales in order to assure adequate service to the utility consumers. With the amendment made by section 6 of the bill there will be no doubt as to the power of the Commission to compel a pipe line to render good service for sales under the Commission's jurisdiction."

It is obvious that the Committee in its report merely reflected the present views of Panhandle's attorney on the issues in this case. It is interesting to note that Mr. Carson who made the report for the Committee at first seemed to entirely agree with Mr. Benton's views but apparently later changed his mind. (Hearings,[5] p. 640.)

It is interesting to note also that in this same report made by the Committee on Interstate and Foreign Commerce (No. 800, 80th Cong., 1st Sess. p. 6) it undertook to disagree with this Court in its interpretation of the Federal Natural Gas Act on production and gathering announced in the cases of *Canadian River Gas Co.* v. *Federal Power Commission* (1945) 324 U.S. 581, 89 L. Ed. 1206; and *Interstate Natural Gas Co.* v. *Federal Power Commission* (1947), 91 L. Ed. (Adv. Op.) 1355.

Finally, the very text of the report of the Committee indicates its weakness. It is based on two propositions (1) interstate pipe line companies furnishing gas direct to ultimate consumers do not occupy a public utility status and (2) national uniformity on such sales is essential and

state regulation is therefore precluded by the commerce clause of its own force. These propositions will next be taken up in order.

F

Panhandle As A Public Utility.

Panhandle, throughout its brief, keeps suggesting, without making a direct contention, that it is not engaged in the public utility business in furnishing gas direct to industrial consumers. On page 27 of its brief it cites the case of *Sioux City* v. *Missouri Valley Pipe Line Co.* (N.D. Ia. 1931) 46 F. (2d) 819, as being the first important case holding state regulation of the type here involved to be invalid. One of the important holdings in that case, as contended by Panhandle, was that service of gas direct by an interstate pipe line company to two local plants did not constitute a public utility business. Likewise, on page 52 of its brief, Panhandle quotes the Report of the Committee on Amendments to the Natural Gas Act (1947) to the effect that Congress intended that there be no regulation of sales direct to industrial consumers by interstate pipe line companies because such activity did not constitute a public utility business. This again is emphasized by Panhandle in its brief at pages 60 to 62.

The substance of this contention seems to be that the State of Indiana cannot by statute make the business of Panhandle's sales direct to industrial consumers a public utility business or affected with public interest if it is in fact a private business, for that would be a taking of Panhandle's property without compensation. That contention, however, is one which may only properly be raised in this case under the Fourteenth Amendment to the Con-

stitution of the United States. (*Champlin Refining Co. v. U. S.* (1947) 91 L. Ed. (Adv. Op.) 9, 12; *Producer's Transportation Co. v. U. S. R. R. Commission* 251 U.S. 228, 230-231, 64 L. Ed. 239). Panhandle in its Assignment of Errors in this case (R. 222-227) which it adopted as its Statement of Points Relied Upon (R. 234) does not claim that the order of the Public Service Commission in this case, or the applicable statutes of Indiana are invalid as a violation of the Fourteenth Amendment to the Constitution of the United States and therefore may not now urge this question. (Rule 27 (4) of Supreme Court of United States). The only constitutional provision which Panhandle claims is involved as shown in its brief, (p. 6) and Assignment of Errors (R. 222-227) is Article 1, Section 8 (3) of the Constitution of the United States. It has already been demonstrated in this brief that the order of the Commission in this case does not conflict with this constitutional provision.

However, from all established tests and principles it seems clear to appellees that Panhandle in furnishing gas direct to industrial consumers is certainly engaged in the public utility business, but in view of the contrary implication in Panhandle's brief, we shall discuss it.

Congress itself in Section 1 (a) of the Federal Natural Gas Act declared (52 Stat. 821 *et, seq;* 15 U.S.C.A. 717 (a)):

> "As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."

In Indiana the term "public utility" is defined in the Public Service Commission Law to be (Section 54-105 Burns 1933):

> "* * * '. . . every corporation . . ., that now or hereafter may own, operate or control any . . . plant or equipment . . . for the . . . transmission, delivery or furnishing of heat, light, water or power . . . either directly or indirectly to or for the public . . .'"

In Section 54-601 A of Burns 1933 (1945 Pocket Supp.) the term, "gas utility" is defined to be:

> "* * * 'any public utility selling or proposing to sell or furnish gas directly to any consumer or consumers within the State of Indiana, for his, its or their domestic, commercial or industrial use.' * * *"

Admittedly, Panhandle is selling gas in Indiana indirectly to and for the public through independent distributing companies. Also it is selling and proposing to sell gas directly to consumers in Indiana. In either case it is a public utility within the definition of the statute. As to its sales to distributing companies for resale it is only subject to the jurisdiction of the Public Service Commission of Indiana to the extent that it does not conflict with the jurisdiction of the Federal Power Commission. But this factor does not exclude it from the definition of the term "public utility" as used in the Indiana law.

At any rate the Supreme Court of Indiana in its opinion interpreted the foregoing statutes of Indiana as including the direct sales to industrial consumers by Panhandle as a public utility business and this construction of a state statute by the highest court of the State has been held by

this Court to be binding upon it. *Railroad Commission of Texas* v. *Pullman Co.* (1940), 312 U.S. 496, 499-500, 85 L.Ed. 971, *Texas Co.* v. *Alton R. Co.* (1941), 117 F. (2d) 210, 213 Cert. denied, 313 U.S. 570, 85 L. Ed. 1529.

Moreover, the activities of Panhandle in furnishing gas direct to industrial consumers constitute a public utility business under well established principles of this Court. Since the decision by this Court in the case of *Munn* v. *Illinois* (1876), 94 U.S. 113, 24 L. Ed. 77, decided more than seventy years ago, but recently followed by this Court in the tobacco sales case (*Townsend* v. *Yeomans*, (1937), 301 U.S. 441, 81 L. Ed. 1210, and also the Pipe Line cases (1914), 234 U.S. 548, 58 L. Ed. 1459; the propriety of regulation of certain businesses has not been questioned. At page 126 of 94 U.S., this Court said:

> "* * * Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

Applying the principle announced in the *Munn* case to the instant case it is clear that Panhandle is using its property in a manner to make it of public consequence and it affects the community at large. As shown in the Additional Statement o fthe Case, *anti.* page 6. Panhandle has a network of pipe lines in Indiana from which it serves directly two industrial consumers and indirectly through

local distributing companies, not affiliated with Panhandle, approximately 112,000 consumers in Indiana. Also, Panhandle has clearly indicated, and taken steps to carry out a program to serve direct all of the industrial consumers in Indiana, thus taking away from the local distributing companies approximately 252 industrial consumers. Such a result will cause a reduction in gross revenues of such distributing companies of approximately 62% which will result in higher rates and less service to the 112,000 gas consumers in the State of Indiana.

Moreover, it has been shown that under the present scheme of regulation in Indiana the Public Service Commission is now regulating the sales by local distributing companies to their 252 industrial consumers, and the sales of gas which Panhandle makes to these companies for resale to such industrial consumers are regulated by the Federal Power Commission, making a complete system of regulation. Yet if Panhandle is correct in its position in this case, then the sales which it makes direct to its industrial consumers are not subject to regulation by either the Federal Power Commission or the State of Indiana. This would create in Indiana a situation where sales to certain industrial consumers are completely regulated, and as to others, wholly unregulated. This would destroy all Indiana regulation of sales to industrial consumers.

In view of the foregoing facts established in the Record in this case, to say that Panhandle's sales direct to industrial consumers is of no public consequence and does not affect the community at large would, to say the least, be quixotic.

The fact that Panhandle in furnishing gas direct to industrial consumers does so under individual contracts which provide for curtailment of service becomes rather unimportant when it is admitted by Panhandle in its brief (pp. 14, 36, 50) that it furnishes gas also to distributing companies for resale under the same type of individual contracts providing for curtailment of service. This is also shown by the Record in this case. (R. 45, 134) Panhandle goes even farther in its brief and says (p. 36) the only difference between its sales to industrial users and distributing companies is only the anticipated use of the product by the buyer. Yet Congress is regulating the business of furnishing gas to distributing companies by Panhandle as a public utility and Panhandle is not contesting, but conceding its jurisdiction, even though it is furnishing gas to distributing companies under individual contracts providing for curtailment.

It is submitted that if Panhandle is thus occupying a public utility status in furnishing gas to distributing companies, (and it doesn't deny it) under the Federal Natural Gas Act, then it occupies a public utility status in serving industrial consumers direct for the service to each as claimed by Panhandle is the same.

Panhandle's contention that it is not a public utility subject to regulation in its sales direct to industrial consumers was fully answered in the case of *Industrial Gas Co. v. Public Utilities Commission of Ohio* (1939), 135 Ohio St. 408, 21 N.E. (2d) 166, 168, where the Court said:

> "It may well be urged that a corporation, calculated to compete with public utilities and take away business from them, should be under like regulatory restriction if effective governmental supervision is

to be maintained. Actual or potential competition with other corporations whose business is clothed with a public interest is a factor to be considered; otherwise corporations could be organized to operate like appellant and in competition with bona fide utilties until the whole state would be honey-combed with them and public regulation would become a sham and delusion.

"What appellant seeks to do is to pick out certain industrial consumers in select territory and serve them under special contracts to the exclusion of all others except such private or domestic consumers as may suit its convenience and advantage. There were other industrial consumers with whom the appellant refused or failed to agree and so did not serve them. If such consumers were served at all, it must necessarily be by a competitor. If a business so carried on may escape public regulation then there would seem to be no valid reason why appellant may not extend the service to double, triple or many times the number now served without being amenable to regulative measures."

To the same effect as the above case are *Orndoff* v. *Public Utilities Commission of Ohio* (1939) 135 Ohio St. 438, 21 N.E. (2d) 334; and *Terminal Taxicab Co.* v. *Kutz* (1915), 241 U.S. 252, 60 L. Ed. 984; *Re. Potter Development Co.* (1939), 32 P.U.R. (N.S.) 45.

The foregoing facts and authorities clearly indicate the untenability of Panhandle's suggestion and authorities cited in support thereof that it does not occupy a public utility status in its sales direct to industrial consumers.

G.

Commerce Clause of Its Own Force and Need for National Uniformity.

We have left to the last part of this brief Panhandle's main contention in this case because it could not adequately be discussed without first presenting to this Court the foregoing parts of this brief.

In the main, Panhandle claims (Brief p. 44-45) that the Commerce Clause of its own force precludes any state regulation of its sales direct to industrial consumers because national uniformity of regulation of such sales is necessary and a state is precluded from acting to impede or block the free flow of commerce.

In support of this claim Panhandle in its brief (p. 44) cites certain language used in the case of *Freeman* v. *Hewitt* (1946), 329 U.S. 249, 252, 91 L. Ed. (Adv. Op.) 205. As pointed out earlier in this brief (p. 20), the *Freeman* case after recognizing that the Commerce Clause of its own force precluded state taxation in certain instances recognized a more liberal and broader rule to be applied when a state police regulation was involved. This has been shown in detail previously in the Argument in this brief at pages 20 to 24. Suffice it to repeat that this Court indicated in the *Freeman* case that a police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests and until Congress chooses to enact a nation-wide rule, the power will not be denied to the State. As heretofore shown, these tests are amply supported by the record in this case. (*Ante* pps. 25 to 29).

This Court in two other recent cases has discussed the scope of the negative function of the Commerce Clause

and the restraints imposed by it upon state power (*Prudential Insurance Co.* v. *Benjamin* (1946), 328 U.S. 408, 90 L. Ed. 1342; *Robertson* v. *People of State of California*, 328 U.S. 440, 90 L. Ed. 1366). In each of those cases it was contended that the state regulation of the insurance business was precluded by the Commerce Clause of its own force, but this contention was rejected in each case upon factors which are likewise present in the instant case.

Panhandle's claim in this case is reminiscent of the claims of Prudential in the *Benjamin* case that the Commerce Clause of its own force precluded state regulation regardless of the action or inaction of Congress. In the *Benjamin* case these contentions were disposed of when this Court said (328 U.S. 421):

> "As has been stated, they are the cases which from Welton v. Missouri, 91 U.S. 275, 23 L.Ed. 347, until now have outlawed state taxes found to discriminate against interstate commerce. No one of them involved a situation like that now here. In each the question of validity of the state taxing statute arose when Congress' power lay dormant. In none had Congress acted or purported to act, either by way of consenting to the state's tax or otherwise. Those cases therefore presented no question of the validity of such a tax where Congress had taken affirmative action consenting to it or purporting to give it validity. Nor, consequently, could they stand as controlling precedents for such a case."

In the present case it has been shown that the power of Congress to regulate the natural gas business is not dormant, but has been exercised by Congress in enacting the Federal Natural Gas Act. It has taken unto itself the

regulation of certain phases of the business and left other phases of the business, including that here in question, for local regulation. (*Ante*, p. 38).

In the *Robertson* case the negative function of the Commerce Clause was directly involved without any attending action by Congress. In other words, the question was whether a state could license insurance agents engaged in interstate commerce when the power of Congress had never been exercised, but lay dormant. It was contended that the Commerce Clause of its own force precluded such state regulation. This Court rejected this contention and said (328 U.S. 448):

> "That appellant's activities were of a kind which vitally affect the welfare and security of the local community, the state and their residents could not be denied. Cf. Hoopeston Canning v. Cullen, 318 U.S. 313, 316 ff, 63 S.Ct. 602, 605, 87 L.Ed. 1722, 145 A.L.R. 1113. * * *"

This Court also stated (328 U.S. 459):

> "It is quite obvious, to repeat only one of those considerations, that if appellant's contentions were accepted and foreign insurers were to be held free to disregard California's reserve requirements and then to clothe their agents or others acting for them with their immunity, not only would the state be made helpless to protect her people against the grossest forms of unregulated or loosely regulated foreign insurance, but the result would be inevitably to break down also the system for control of purely local insurance business. In short, the result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them or, perhaps, by foreign countries. Inevitably this would mean that Congress

> would be forced to intervene and displace the states in regulating the business of insurance. Neither the commerce clause nor the South-Eastern decision dictates such a result."

As demonstrated in this brief previously (p. 26), if Panhandle is left free, without any federal or state regulation in the instant case, to serve all the industrial consumers in Indiana, this will destroy the present system of regulation in Indiana of the natural gas business and cause irreparable damage to the 112,000 gas consumers in the State of Indiana.

The cases of *Missouri ex rel. Barrett* v. *Kansas Natural Gas Co.* (1924), 265 U.S. 298, 68 L. Ed. 1027 and *Public Utilities Commission* v. *Attleboro Steam and Electric Co.* (1927), 273 U.S. 83, 71 L. Ed. 549 relied upon by Panhandle do not preclude the state regulation in this case. The *Barrett* case involved sales by an interstate pipe line company, not to consumers, but to independent local distributing companies for resale by them to local consumers. The Court held that the activity was interstate commerce and that there were no local aspects present to justify any state regulation. The Court distinguished the *Landon* and *Pennsylvania Gas Co.* cases (heretofore discussed in detail p. 30 of this brief) in this language (265 U.S. 309):

> "In both cases the things done were local and were after the business in its essentially national aspect had come to an end. The distinction which constitutes the basis of the present decision is clearly recognized in the *Landon Case*. The business of supplying, on demand, *local consumers is a local business*, even though the gas be brought from another State and drawn for distribution directly from interstate mains; and this is so whether the local

distribution be made by the transporting company or by independent distributing companies. In such case the *local interest is paramount*, and the interference with interstate commerce, if any, indirect and of minor importance. * * *" (Our italics).

Then this Court said as to the activities in the *Barrett* case (265 U.S. 309):

"* * * But here the sale of gas is in wholesale quantities, *not to consumers*, but to distributing companies for resale to consumers in numerous cities and communities *in different States*. * * *" (Our italics.)

Also, in the *Attleboro* case (273 U.S. 83) the question again involved regulation by a state of sales by an interstate electric company to a local distributing company for resale. This Court followed the *Barrett* case and held the regulation invalid. But again the *Pennsylvania Gas Co.* case was distinguished by this Court when it said (273 U.S. 89):

"It is clear that the present case is controlled by the *Kansas Gas Co.* case. *The order of the Rhode Island Commission is not, as in the Pennsylvania Gas Co. case, a regulation of the rates charged to local consumers*, having merely an incidental effect upon interstate commerce, but is a regulation of the rates charged by the Narragansett Company for the interstate service to the Attleboro Company, which places a direct burden upon interestate commerce. Being the imposition of a direct burden upon interstate commerce, from which the State is restrained by the force of the Commerce Clause, it must necessarily fall, regardless of its purpose. * * *" (Our italics).

From the foregoing cases relied upon by Panhandle, coupled with the case of *Pennsylvania Gas Co.* v. *Public Service Commission* (1920) 252 U.S. 23, 64 L. Ed. 434 (this brief, p. 30) the conclusion is inescapable that this Court has considered that the furnishing of natural gas by interstate pipe line companies in either intrastate or interstate commerce direct to *local consumers* is a local activity of paramount local importance which the states may regulate. (See Article of Prof. Powell in 58 Harvard Law Review 1072, 1082, quoted in part in this brief, *ante*, p. 34.)

Panhandle denies this conclusion and states that its activities in selling direct to industrial consumers are more akin to its sales to distributing companies for resale which this Court has held this state may not regulate, but are regulated by Congress. If this is true, is it not odd that Congress did not provide for the regulation of Panhandle's sales direct to industrial consumers at the same time that it provided for the regulation of Panhandle's sales to distributing companies for resale when it enacted the Federal Natural Gas Act? This versatility of argument by Panhandle inverting state and national power, each in alternation to ward off the other's incidence is obviously a product of self interest on the part of Panhandle to engage in a business wholly unregulated by either the Federal or State governments.

Panhandle overlooks the fact that in selling its gas direct to industrial consumers it is engaging in a business similar to that done by local distributing companies in selling gas to its industrial consumers. In each case gas is furnished under individual contracts providing for interruptible service and the local distributing companies

are furnishing large amounts of gas to their industrial consumers also. (R. 132) Moreover, the important similarity between Panhandle's sales to industrial consumers and the sales by local distributing companies to industrial consumers is the fact which this Court considered important in the *Pennsylvania Gas Co.* case that they are both serving local consumers which vitally affects local interests.

Panhandle claims, however, in its brief (pp. 14, 43) that national uniformity of regulation of sales by interstate pipe line companies direct to industrial consumers is necessary in the national interest and precludes state regulation. Panhandle's argument amounts to this: That because conditions of interruptible service might vary at different sections along its transmission lines from Texas to Michigan, any regulation by one state might interfere with the interstate transportation to another state. In this sense, Panhandle is speaking of *interstate transportation* which is under the control of Congress under the Federal Natural Gas Act and which the state is precluded from regulating. (52 Stat. 821; 15 U.S.C.A. 717) Unless and until a state would make a regulation of this *transportation* the question is not presented. Certainly in this case there is no regulation of that kind involved.

It seems pertinent to remark at this point that if Panhandle is correct in its contention that national uniformity of regulation was required in this regard, that Congress would not have overlooked this fact when it passed the Federal Natural Gas Act. Since Congress entered upon the regulation of certain interstate features of the gas business in passing this Act it would seem that if national uniformity were required on this matter it would have pro-

vided for regulation to insure it. Panhandle admits, however, that Congress did not provide for such regulation. That Congress did not believe national uniformity was required has already been indicated herein at page 38, *ante*, in discussing the legislative history of the Federal Natural Gas Act.

Another significant fact as shown by the Record in this case is that this matter of interruptible service has existed under state regulation without conflict or turmoil for some time. While Panhandle furnishes gas direct to industrial consumers under individual contracts providing for interruptible service it does the *same thing* in furnishing gas direct to local distributing companies for resale. Also these local distributing companies purchasing Panhandle gas do the *same thing* by furnishing gas direct to their industrial consumers under individual contracts providing for interruptible service. (R. 45, 134, 175).

These local distributing companies in furnishing gas direct to industrial consumers under individual contracts providing for interruptible service have always been subject to the regulation by the Public Service Commission of Indiana. There is nothing in the Record in this case to show that this regulation has interfered in any way with Panhandle's operations.

The Record in this case is barren of any facts to show that the regulation by the Public Service Commission of Indiana of direct sales by Panhandle to industrial consumers has or will have any injurious effect upon Panhandle's operations as to curtailment of service or otherwise. Until such facts are shown, Panhandle's contention is too premature and hypothetical to warrant consideration on this Record. "Action which sometimes seems pregnant

with possibilities of conflict, may, as consummated, be wholly barren of it." (*Rice v. Board of Trade*, (1947), 91 L. Ed. (Adv. Op. 1058, 1062; *Champlin Refining Co. v. United States* (1947), 91 L. Ed. (Adv. Op.) 9, 12.)

Moreover, this Court has held, as a matter of law, that direct sales by interstate pipe line companies to local consumers do *not* require national uniformity. In *Pennsylvania Gas Co.* v. *Public Service Commission* (1920), 252 U. S. 23, this Court said: (252 U.S. 31)

> "This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the States, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest and has not been attempted under the superior authority of Congress.
>
> "It may be conceded that the local rates may affect the interstate business of the company. But this fact does not prevent the State from making local regulations of a reasonable character. Such regulations are always subject to the exercise of authority by Congress enabling it to exert its superior power under the commerce clause of the Constitution."

The cases of *Southern Pacific Co.* v. *Arizona* (1945), 325 U. S. 761 and *Morgan* v. *Virginia* (1946), 328 U. S. 373, relied upon by Panhandle in its brief (pp. 43, 45) do not preclude the state regulation here in question. Both cases may be distinguished from the present one on at least three grounds. They were regulations of *pure interstate transportation*, where the activity regulated entered the state,

passed through it and continued to other states. In this case the activity regulated comes to an end in this state by local consumption.

Also these cases were regulations in the realm of pure interstate commerce and transportation in which Congress had in no way acted and its power lay dormant. In this case Congress has acted by occupying part of the field of the regulation of the gas business and has left the other matters to be regulated by the states. Finally, there was not present in either case any vital local interests to be protected. In this case we have previously demonstrated that there are undeniable vital local interests which must be protected.

Panhandle in its brief cites other cases to support its position that the State of Indiana may not regulate its sales direct to industrial consumers. On page 27 of its brief it cites *Sioux City* v. *Missouri Valley Pipe Line Co.* (N. D.) Ia. (1931) 46 F. (2d) 819. There it was held that a city could not prohibit an interstate pipe line company from laying its lines and furnishing gas to two plants without the consent of the city. No such question is involved in this case.

The decision of the Colorado Public Service Commission in *Re. Colorado Interstate Gas Co.*, P. U. R. 1933 E 349, (App. Brief, p. 28) is in apparent conflict with the decision of the Supreme Court of Indiana on the question at issue, but it is submitted that the opinion, of the Indiana Supreme Court should be more persuasive to this Court than that of the Colorado Public Service Commission.

The case of *State ex rel. Cities Service Company* v. *Public Service Commission* (1935) 337 Mo. 809, 85 S. W. (2d) 890 (App. brief, p. 29) was later distinguished and

questioned by the Missouri Supreme Court in *Mississippi River Fuel Corp.* v. *Smith* (1942), 350 Mo. 1, 164 S. W. (2d) 370, at p. 376, when it cautioned that the ruling in that case was prior to the rulings of this Court in *Southern Natural Gas Corporation v. Alabama,* 301 U. S. 148, 81 L. Ed. 970, and *Arkansas Louisiana Gas Co.* v. *Department* (1938) 304 U. S. 61, 82 L. Ed. 1149.

The case of *Interstate Natural Gas Co.* v. *La. Public Service Commission* (E. D. La.—1940) 34 F. Supp. 980 holds that the pipe line company there involved was not a public utility and not subject to state control. We have demonstrated herein (p. 49) that Panhandle in the activities here in question is a public utility.

CONCLUSION.

It is submitted that the applicable principles of law, announced by this Court in its decisions reviewed in this brief, applied to the facts in this case, established by the Record, support the order of the Public Service Commission of Indiana in this case, and that the judgment of the Supreme Court of Indiana should be affirmed.

Respectfully submitted,

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